

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

In re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
David S. Chase,	)	MPC 148-0803	MPD 126-0803
	)	MPC 106-0803	MPC 209-1003
Respondent.	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
	)		MPC 87-0703

**RESPONDENT’S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ACCESS  
TO PATIENT MEDICAL RECORDS AND PATIENT EXAMS**

Respondent, David S. Chase, M.D., through counsel, submits the following Reply Memorandum in support of his Motion for Access to Patient Medical Records and Patient Exams.

**MEMORANDUM OF FACT AND LAW**

**I. Introduction.**

The State’s Opposition to Respondent’s Motion for Access to Patient Medical Records and Patient Exams fails to substantively address, much less rebut, the arguments set forth in Respondent’s Motion. In the final analysis, the facts, the law, and important public policies weigh strongly in favor of granting Dr. Chase the relief he seeks.

## **II. Discussion.<sup>1</sup>**

### **A. Legal Precedent Requires That The State's Witnesses Turn Over Their Medical Records And Submit To Eye Exams Or Be Excluded As Witnesses.**

The State first contends, without citing a shred of legal authority, that Dr. Chase has no right to the medical records and patient exams that he seeks, and that the complaining witnesses should not be required to provide the requested information if they are to testify at the hearing. The State's position is at direct odds with the law governing these proceedings, as set forth in detail in Respondent's Motion. The State cannot do away with Dr. Chase's procedural rights simply by advancing the unsupported allegation that they do not exist. Yet that is precisely what the State is attempting to do here. The Board must apply the law as it actually exists, not as the State wishes it to be. That law makes clear that the complaining witnesses may not be allowed to testify against Dr. Chase at the merits hearing unless they provide Dr. Chase the same access to medical records as they have provided the State and submit to the same eye exam by Dr. Chase's expert as they have permitted the State's expert and physician witnesses to conduct. Depriving Dr. Chase of equal access to this crucial evidence will rob this entire proceeding of its integrity and fairness.

### **B. Dr. Chase Has Been Denied The Same Access To Medical Records As Has Been Afforded The State.**

The State next contends that "there is simply no reason" for Dr. Chase to have the same access to medical records as has been afforded the State. It even goes so far as to state that Dr. Chase is seeking "unfettered access to traipse through [the complaining witnesses'] medical

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<sup>1</sup> As usual, the State begins its Opposition with an ad hominem attack on the request of Dr. Chase and his attorneys for equal access to crucial evidence. Dr. Chase has no interest in delaying a fair proceeding and hearing in this matter. If delay has occurred, it is the result of the State's obstinacy in insisting that the merits hearing in this case be governed by procedures more typical of a sham trial than of a fair hearing held in a law-based society where an individual's constitutionally protected rights are at stake.

records,” and suggests that Dr. Chase’s routine request for medical records is a form of “retaliation” against the complaining witnesses. (Opposition at 3.)

Of course, the State took a very different position when it sought and received its own broad medical records releases from 12 of the 13 complaining witnesses—releases that are identical to those Dr. Chase now seeks. The State’s position can accurately be summarized as follows: The State requires broad access to patient medical records in order to properly investigate and prosecute complaints against doctors, and it is therefore reasonable for it to seek broad medical records releases from complaining witnesses as a condition of investigating such complaints; Dr. Chase, on the other hand, does not need the same access to those same medical records in order to investigate and defend himself against the State’s charges, and his efforts to seek a release identical to that sought and received by the State constitutes retaliation against the witnesses. The Board should reject the State’s one-sided view of the law as completely out of touch with the fundamental requirement of fair and equal procedures that must form the basis for any State-sponsored deprivation of constitutionally recognized rights.

**C. Dr. Chase’s Position Is Consistent With The Board’s Practice And Sound Public Policy.**

The State next makes a hypocritical appeal to public policy in order to rescue its legally baseless position. Specifically, the State contends that it violates sound public policy to require complaining witnesses to grant broad access to their medical records as a condition of prosecuting a complaint against a doctor because to do so would discourage patients from filing complaints. Of course, the State totally ignores the fact that the Board itself places precisely that condition on every complaining witness through its own Complaint Form, which prominently informs each complainant: *“Please note: Investigation of your complaint also requires your signed release. When we receive both this signed Complaint Form and your Authorization for*

*Release of Medical Records, we will send an acknowledgement assigning a docket number to your case.”*<sup>2</sup> Moreover, Board Rules 12.1 and 13.2 require that every complaint shall be accompanied by an executed release form. Needless to say, this condition has not “forever discourage[d] patients from filing complaints against physicians,” as the State’s “Chicken-Little” Opposition forecasts. (Opposition at 4.) In the end, the State simply objects to providing Dr. Chase the same access to medical records that it has sought and received for itself. The State can offer no justification for this proposed unfair disparity of treatment because there is none. Dr. Chase needs access to the complaining witness medical records for the same reason the State and Board sought and received that access---to investigate, evaluate, and (if necessary) litigate the veracity of the patients’ claims of improper medical treatment.

**D. The State Must Not Cooperate With The Malpractice Attorneys Suing Dr. Chase.**

In response to Dr. Chase’s argument that the State is improperly cooperating with the malpractice attorneys suing him, the State suggests that it has simply been communicating with several of its complaining witnesses through their lawyers, and nothing more. Apparently, the State believes that if it ignores the substance of Dr. Chase’s concerns, the Board will as well. Thus, the State does not even address, much less disclaim, its substantial efforts to refer at least one client to those malpractice lawyers, to invite those lawyers to depositions of the State’s experts and unrepresented patients, and to share with those lawyers deposition transcripts potentially containing protected patient medical information. As demonstrated in Dr. Chase’s Motion, all of these cooperation efforts have had a prejudicial effect on Dr. Chase’s ability to defend himself, have undermined the legitimacy of these proceedings, and have potentially violated the rights of the patient-witnesses as well.

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<sup>2</sup> See Medical Practice Board Complaint Form at 2, an example of which is attached as Ex. A to Respondent’s Motion. (emphasis added).

In its Opposition, the State argues that it does not share the Board's duty to prosecute the specification of charges without the obvious bias evidenced by cooperation with malpractice attorneys suing the Respondent. The State contends that it is not prosecuting the charges on behalf of the Board, but instead acts autonomously of any Board direction or restraint. However, the Board's enabling legislation demonstrates the State's fundamental misapprehension of its role in these proceedings. That legislation makes clear that it is the Board, not the Attorney General, that must prepare and prosecute charges against doctors:

If the board or committee determines that a hearing is warranted, the secretary shall prepare a specification of the charge or charges of unprofessional conduct made against [the] medical practitioner.

26 V.S.A. § 1356. Board Rules provide that the Board may have the aid of an Assistant Attorney General in drafting and prosecuting the Specification of Charges. See Board Rule 15.1(c).

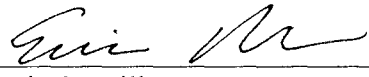
However, that Rule does nothing to alter the statutorily mandated fact that it is the Board, not the Attorney General, that brings and prosecutes charges against a doctor. Thus, the Assistant Attorney General clearly represents the prosecutorial arm of the Board in this matter and must act consistently with that Board's authority and interests. Of course, the Board has no power or authority to offer active assistance to malpractice lawyers suing practitioners, and it places its legitimate but circumscribed prosecutorial and adjudicative authority at risk if it allows its powers to be co-opted by private plaintiffs' lawyers. In order to preserve its legitimacy, and the legitimacy of these proceedings, the Board should not abide the Assistant Attorney General's active cooperation with the malpractice attorneys suing Dr. Chase and should put an immediate end to those improper activities.

### III. Conclusion.

For the reasons set forth above, Respondent respectfully requests that the Board exclude evidence regarding the medical condition and treatment of any patient-witness who does not afford Dr. Chase the same access to medical records and eye examinations as he or she has afforded the State. The Board must also forbid its Assistant Attorney General from cooperating with malpractice attorneys suing Dr. Chase for money damages.

Dated at Burlington, Vermont, this 11<sup>th</sup> day of August, 2004.

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**STATE OF VERMONT  
CHITTENDEN COUNTY, SS.**

In re: David S. Chase MD	)	Docket Nos. MPC 15-0203, MPC 110-0803,
	)	MPC 208-1003, MPC 163-0803, MPC 148-0803,
	)	MPC 126-0803, MPC 106-0803, MPC 209-1003,
	)	MPC 140-0803, MPC 89-0703, MPC 122-0803,
	)	MPC 90-0703, MPC 87-0703

**CERTIFICATE OF SERVICE**

I, Eric S. Miller, counsel for Respondent David S. Chase, do hereby certify that on August 11, 2004, a copy of **Respondent's Reply Memorandum in Support of Motion for Access to Patient Medical Records and Patient Exams** was served by United States First Class Mail to:

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Dated: August 11, 2004.

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